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No. 73-1651

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

THEODORE J. ISAACS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER ISAACS

This reply to the Government's Brief in Opposition follows the order and headings set forth in our Petition. The paragraph number of that portion of the Government's Brief corresponding to each of Petitioner's points appears alongside each heading.

1. Misjoinder of defendants, applicability of Rule 8(b), Federal Rules of Criminal Procedure, and interpretation of Rule 8(b) in contrast to Rule 8(a). (G.Br. ¶ 4)

The Government contends that joinder of the perjury and false statement counts was proper because each "arose from a common 'series of acts or transactions' involving a scheme by public officials to perform favors for

Mrs. Everett's racing interests in return for illegal bribes • • • •"[1] (G.Br. 20) This is in direct contrast to the position taken by the Government at trial and on appeal.

At each stage of the proceedings below the Government expressly conceded that statements made by Kerner to the Grand Jury, to investigating Internal Revenue Service Agents and in his tax returns were not admissible against Isaacs (e.g., Tr. 4590, 4685, 5057; see also, 4602-6, 4698, 4775-6), thus impliedly conceding that these statements were not part of the transaction described by the Travel Act, Mail Fraud and conspiracy counts. *Krulewitch* v. *United States,* 336 U.S. 440 (1949); *Lutwak* v. *United States,* 344 U.S. 604 (1952); *Grunewald* v. *United States,* 353 U.S. 391 (1957).

The flaw in the Government's reasoning is that it regards joinder of offenses as proper, if those offenses are committed as part of the same series of acts or transactions. But, as we have pointed out in our Petition (I. Pet. 23-4), this is Rule 8(a) language. Rule 8(b) permits joinder only if the series of acts or transactions constitute an offense.[2] *United States* v. *Granello,* 2nd Cir. 1967, 365 F.2d

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[1] The Government's Statement of the case, although accurately reciting that the offer of racetrack stock was made to Kerner and Isaacs while the former was Governor and the latter was Director of the Department of Revenue (G.Br. 3), inaccurately makes it appear as though the Department of Revenue, or Isaacs, had some control over racing. Such was not the case. Moreover, Isaacs resigned as Director on September 15, 1963, long before the stock was delivered. (Tr. 6792) No part of this case touched upon the Department of Revenue or Isaacs' conduct of the affairs of that Department.

[2] By inadvertence counsel for Petitioners neglected to print Rule 8 of the Federal Rules of Criminal Procedure (18 U.S.C.A.) in their Joint Appendix. The Rule is printed *infra,* Appendix A.

990, 993. Thus, the Government's acknowledgement that the perjury and false statements were not part of the so-called bribery scheme bears heavily on its claim that counts charging these offenses could be joined with the counts charging the bribery.

2. Prejudice arising from joint trial with co-defendant charged with perjury, where that co-defendant is principal witness for the defense. (G.Br. 5 b)

By failing to recognize the essential difference between a claim of misjoinder under Rule 8(b) and a claim of prejudice warranting relief under Rule 14, the Government attempts to obscure Isaacs' claim with respect to his being tried under circumstances where the jury is advised that his principal defense witness has been charged with perjury for giving essentially the same testimony before a grand jury.[3] This question presupposes proper Rule 8(b) joinder. It asks whether Isaacs was entitled to relief under Rule 14 because the trial jury was advised that the

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[3] Even under this Point the Government seems to claim that joinder of the counts charging perjury and false statements was proper merely because Kerner and Isaacs were properly joined in the Travel Act, Mail Fraud and conspiracy counts. (G.Br. 23-4) This, clearly, is not the permission given by Rule 8(b). King v. United States, 1st Cir. 1966, 355 F.2d 700; Metheany v. United States, 9th Cir. 1966, 365 F.2d 90; Ward v. United States, D.C. Cir. 1961, 289 F.2d 877; United States v. Bova, 5th Cir. 1974, 493 F.2d 33. Kerner and Isaacs were properly joined in the counts based on the so-called bribery scheme because those counts reflected a series of transactions "constituting an offense or offenses." The propriety of that joinder would not validate joinder of independent counts against individual defendants. E.g., Ward v. United States, *supra*.

Grand Jury had heard the testimony of his principal witness, Kerner, and had concluded that it was wilfully false. Rule 14 is the proper vehicle for making the claim and for affording relief because Isaacs' witness was also his co-defendant.

The government is correct when it avers that this argument "is substantially identical to petitioner Kerner's argument for a separate trial of the perjury charge * * * *" (G.Br. 24; see I. Pet. 24) But, as we have carefully pointed out (I. Pet. 27-8), the prejudice arises not from the introduction of Kerner's allegedly false exculpatory statements, but from the awareness of the trial jury that the Grand Jury had already considered these same statements and found they were false.

3. Existence of scheme to defraud where only loss is the State's right to "honest and faithful" services. (G.Br. ¶ 2a)

Each of the authorities cited by the Government in response to our claim that the Mail Fraud statute does not encompass loss of intangibles involved actual loss to the alleged victim. Thus, for example, the public bribery cases (e.g., *Shushan* v. *United States,* 5 Cir. 1941, 117 F.2d 110; *United States* v. *Faser,* E.D.L.A. 1969, 303 F.Supp. 380) resulted in actual loss to the public body by reason of its payment of exorbitant fees or its loss of interest on bank deposits.

In this case, however, contrary to the claims of the Government (G.Br. 16-17), there was no showing that the State lost additional revenues from legislation allegedly favoring track operators, or that other racing associations were deprived of additional profits. In fact, Government witness Miller called the charge that he and Kerner facili-

tated the allocation of racing dates to the benefit of CTE and to the detriment of other associations, "preposterous." (Tr. 3254-5) Miller demonstrated that all racing associations prospered during Kerner's administration. (Tr. 3255) No racing dates were changed; no racing association, with the exception of Egyptian Enterprises, CTE's tenant, failed to receive the dates for which it applied. (Tr. 3274; Exs. 583-88; App. p. 15a)

Most importantly, however, the jury was instructed on the pure "loss of honest and faithful services" theory, thereby making it impossible to determine the grounds upon which the jury verdict rested. See *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957); *Vitello* v. *United States*, 9 Cir. 1970, 425 F.2d 416, 419; *cf. Street* v. *New York*, 394 U.S. 576, 585-6 (1969).

4. Failure to instruct as to, and lack of proof of, intent to use interstate facilities. (G.Br. ¶ 3)

Despite the parenthetical nature of its observation that "the jury was instructed that to find a conspiracy to use the mails in furtherance of a scheme to defraud it must find, *inter alia*, that use of the mails was either contemplated by the conspirators or reasonably foreseeable" (G. Br. 19, n. 7), we assume that the Government's response is based essentially on an attempt to equate the element of "knowingly" using the mails with the element of "intending" to use the mails.[4]

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[4] We also assume, in view of its lack of response supporting the Opinion of the Court of Appeals that intent to use interstate facilities is unnecessary to a conspiracy to violate Section 1952, that the Government has abandoned this much of its argument below.

The Government incorrectly construes the instructions given below.[5] Judge Taylor, in delivering his charge, specifically told the jury:

> "It is not necessary that the use of the mails be contemplated by the scheme or that [the] defendant does any actual mailing or intends that the mails be used. It is sufficient to establish this element of crime if the mails were in fact used to carry out the scheme and that the use of the mails was reasonably foreseeable." (Tr. 7458)

He also told the jury:

> "It is not necessary that the use of the mails by the participants themselves be contemplated or that one of them do the actual mailing or that they consciously form in their minds a specific intent to use the mails in furtherance of the scheme. It is enough that the mails were in fact used to carry out the scheme and that such use by someone could reasonably be foreseen as a part of the execution of the scheme." (Tr. 7460)

Thus, Judge Taylor not only did not tell the jury that *intent* to use the mails was necessary to a conviction for conspiracy, he told them such intent was not necessary.

The Government, in its Brief, has confused the instructions given on knowledge—which is not in issue here—with the requested instructions on intent—which is the issue presented here. In view of the failure of the district judge to instruct that intent to use the mails, and intent to use interstate facilities, were essential elements of the conspiracy charge, this case falls squarely within the question presented by *United States* v. *Feola*, No. 73-1123, certiorari granted April 15, 1974.

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[5] This portion of the charge is attached as Appendix B. The charge, as given, plainly refers to the substantive counts. Nevertheless, the court also refused to instruct that intent to use the mails was an element of the conspiracy.

CONCLUSION

For the above and foregoing reasons, as well as for those applicable reasons set forth in the Petition of Otto Kerner, Jr., #73-1650, certiorari should be granted.

Respectfully submitted,

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